92-150

No.

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUSAN BRIMER LOVING
ATTORNEY GENERAL

RABINDRANATH RAMANA*
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln Blvd., Suite 112
Oklahoma City, OK 73105-4894
(405) 521-3921

Michael M. Sykes, General Counsel
Kayla A. Bower, Assistant Counsel
Oklahoma Department of Labor

June, 1992
* Counsel of Record

No. ,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUSAN BRIMER LOVING
ATTORNEY GENERAL

RABINDRANATH RAMANA*
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln Blvd., Suite 112
Oklahoma City, OK 73105-4894
(405) 521-3921

Michael M. Sykes, General Counsel
Kayla A. Bower, Assistant Counsel
Oklahoma Department of Labor

June, 1992
* Counsel of Record

QUESTIONS PRESENTED

Oklahoma law provides that workmen on public works projects must be paid no less than the prevailing hourly wage for work of a similar character in the locality in which the work is performed. Pursuant to state prevailing wage laws, Oklahoma's Labor Commissioner issued a declaratory ruling that only workmen in training programs approved as apprenticeship programs by the United States Department of Labor may be paid at wage rates less than the journeyman rate for work performed on state public works projects. The questions presented are:

1. Whether, since federal law encourages the formulation of labor standards for apprentices, ERISA's savings clause for federal laws protects from preemption a state's determination that employees in a training program may be paid

less than journeymen wage rates only if the training program is approved as an apprenticeship program by the United States Department of Labor.

2. Whether, as the Tenth Circuit held, a state law concerning the wage rate that may be paid to a certain category of workmen on public works projects relates to an employee welfare benefit plan such that the state law is preempted by ERISA.

PARTIES TO THE PROCEEDINGS

The Petitioner, Dean H. Calhoon, formerly served as Commissioner for the Department of Labor for the State of Oklahoma. Mr. Calhoon issued the December 22, 1989, Declaratory Ruling at issue in the instant case. Petitioner, the Department of Labor for the State of Oklahoma, is the state agency responsible for enforcing Oklahoma's labor laws.

The Respondent is the National Elevator Industry, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

PARTIES TO THE PROCEEDINGS. . . . iii

OPINIONS BELOW. 2

JURISDICTION. 3

STATUTORY AND REGULATORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT . . .12

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH AND TENTH CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF ERISA'S SAVINGS CLAUSE TO STATE REGULATION OF EMPLOYEE TRAINING PROGRAMS . . 13

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ERISA PREEMPTS STATES' REGULATION OF APPRENTICE WAGE RATES ON PUBLIC WORKS PROJECTS 28

CONCLUSION 37

TABLE OF AUTHORITIES

CASES CITED

California Hospital Ass'n v. Henning,
770 F.2d 856 (9th Cir. 1985),
cert. denied, 477 U.S. 904,
reh'g denied 478 U.S. 1031 (1986) . 32

Dillingham Construction N.A.
Inc. v. County of Sonoma,
778 F. Supp. 1522
(N.D. Cal. 1991) 26, 37

Electrical Joint Apprenticeship
Committee v. MacDonald,
949 F.2d 270
(9th Cir. 1991) 14, 23, 25-27

General Electric Co. v. New York
State Department of Labor,
891 F.2d 25 (2nd Cir. 1989)
cert. denied 110 S.Ct. 2603
(1990) 30, 33

Hydrostorage Inc. v. Northern
California Boilermakers Local
Joint Apprenticeship Committee,
891 F.2d 719 (9th Cir. 1989),
cert. denied 101 S.Ct. 72 (1990) . 33

Krause v. Dresser Industries, Inc.,
910 F.2d 674 (10th Cir. 1990) . . . 32

Local Union 598, Plumbers and
Pipefitters Journeymen and
Apprentices Training Fund v.
J.A. Jones Construction Co.,
846 F.2d 1213 (9th Cir.)
aff'd 488 U.S. 881 1988) 32

Massachusetts v. Morash,
490 U.S. 107 (1989) 31, 34, 35

Metropolitan Life Insurance
Co. v. Massachusetts,
471 U.S. 724 (1985) 31

Scott v. Gulf Oil Corp.,
754 F.2d 1499 (9th Cir. 1985) . . . 32

Shaw v. Delta Air Lines, 463 U.S.
85 (1983). 15, 20-23, 27, 29, 30

Siuslaw Concrete Construction
Co. v. Department of Transportation,
784 F.2d 952 (9th Cir. 1986) . . . 31

Wisconsin Public Intervenor v.
Mortier, 111 S.Ct. 2476 (1991),
quoting Rice v. Santa Fe
Elevator Corp., 331 U.S. 218 (1947) 12

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

29 C.F.R. § 29.12 18

29 C.F.R. § 29.5 18

29 C.F.R. § 2510.3(b)(1) 31

29 C.F.R. § 2510.3-1(b) 3

29 C.F.R. §§ 29.1 4

29 C.F.R. §§ 29.2(e), 29.4 19

29 C.F.R. §§ 29.3-29.5 18

29 U.S.C. § 50 . . . . . 4, 16

29 U.S.C. § 151 10

29 U.S.C. § 1001 14

29 U.S.C. § 1002(1) 15

29 U.S.C. § 1144(a) 15, 29

29 U.S.C. § 1144(d) 13, 16

29 U.S.C. §§ 1144 3

42 U.S.C. §§ 2000(e) 20

60 U.S.L.W. 3655 (Feb. 3, 1992) (No. 91-1416) 14

Okla. Stat. tit 40, § 196.1 (1991) . 5

Okla. Stat. tit. 40, § 196.10a (1991) 5

Okla. Stat. tit. 40, § 196.2(9) (1991) 5, 8

Okla. Stat. tit. 40, §§ 196.1, (1991) 4

No. ,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Dean H. Calhoon, the former Commissioner of the Department of Labor for the State of Oklahoma, and the Department of Labor for the State of Oklahoma, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is published at 957 F.2d 1555 and has been reprinted as Appendix A in the appendix to this certiorari petition. The decision of the United States District Court for the Western District of Oklahoma was not published, but it is reprinted as Appendix B. The December 22, 1989, Declaratory Ruling issued by Petitioner Calhoon is reprinted as Appendix C.

JURISDICTION

The order and judgment of the Tenth Circuit were entered on February 26, 1992. No petitions for rehearing were filed. On May 13, 1992, Justice White extended the time for filing a petition for writ of certiorari to and including June 26, 1992.

The district court had jurisdiction over this matter under 28 U.S.C. § 1331. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves §§ 3(1) and 514 of the Employee Retirement Income Security Act (ERISA), as amended, 29 U.S.C. §§ 1144 and 1002(1); regulations promulgated pursuant to ERISA, 29 C.F.R.

§ 2510.3-1(b); the National Apprenticeship Act of 1937 (the Fitzgerald Act), 29 U.S.C. § 50; regulations promulgated pursuant to the Fitzgerald Act, 29 C.F.R. §§ 29.1 et seq.; Oklahoma's prevailing wage law, Okla. Stat. tit. 40, §§ 196.1, (1991) et seq.; and regulations promulgated pursuant to Oklahoma's prevailing wage law. The relevant statutes and rules are reprinted in Appendix D.

STATEMENT OF THE CASE

This dispute concerns the appropriate rate of wages to be paid to a particular category of workmen, elevator mechanics' helpers, on public works projects funded by the state of Oklahoma. Oklahoma has enacted a series of statutes that provide that all workmen employed on behalf of public bodies shall be paid a

wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed. Okla. Stat. tit 40, § 196.1 (1991). Oklahoma's prevailing wage law further provides that "[n]othing in this act shall prevent the employment of registered apprentices or trainees. . . ." Okla. Stat. tit. 40, § 196.10a (1991). An apprentice/trainee is defined as "a workman in a craft or trade who is approved for participation in an apprenticeship or trainee program approved by the Bureau of Apprenticeship Training of the United States Department of Labor." Okla. Stat. tit. 40, § 196.2(9) (1991).

Oklahoma's Labor Commissioner has promulgated a series of rules that

clarify the kind of workmen who will be deemed apprentices for the purposes of determining wage rates on public works projects. Rule 7 of the Commissioner's prevailing wage rules provides, in part:

> Journeyman's rate of pay will be paid to all workers employed on prevailing wage projects except "Apprentices" or "Trainees" enrolled and participating in "Apprentice" or "Trainee" programs registered with the U.S. Department of Labor's Bureau of Apprenticeship and Training.

Rule 8 of the Commissioner's Prevailing Wage Rules states, "'Helper' as a classification of worker shall not be recognized by the Oklahoma Department of Labor."

In August, 1989, Respondent the National Elevator Industry, Inc. (NEII), a trade association that represents employers engaged in constructing,

repairing, and servicing elevators, escalators, dumbwaiters, and moving walkways, filed a Petition for Declaratory Ruling with the Oklahoma Department of Labor. NEII requested the Labor Department to find that elevator mechanic's helpers should be paid the wage rate for such helpers that has been established by the United States Department of Labor for federally funded public works projects in particular geographical areas of Oklahoma. That wage rate is set at 70% of the wage rate for mechanics (50% for helpers with less than six months experience). In support of its Petition, NEII presented materials regarding its training program for elevator mechanics' helpers.

On December 22, 1989, Commissioner Calhoon issued a ruling denying NEII's

request. Commissioner Calhoon concluded that elevator mechanics' helpers did not constitute a discrete kind of worker. He observed that, by NEII's own description, "an elevator constructor helper may have anywhere from one (1) day's experience to twenty (20) or more years of experience." He further explained that, although NEII characterized these helpers as trainees and apprentices, there was no indication in the record that NEII's program had been approved by the Bureau of Apprenticeship Training of the United States Department of Labor (the BAT). The Commissioner noted that, under Okla. Stat. tit. 40, § 196.2(9) (1991), such approval was required before apprentices and trainees could be recognized on public works projects in Oklahoma.

As a result, Commissioner Calhoon concluded that "should the elevator constructor helper educational program be accepted by the Bureau of Apprenticeship Training, then we will accept elevator constructor helpers as a trainee/apprentice under that program regardless of how the industry chooses to refer to them." Until such recognition, the Commissioner found, elevator mechanics' helpers would not be entitled to recognition under the Oklahoma laws regarding wages on public works projects. Therefore, under the Commissioner's Declaratory Ruling, until BAT approval of the NEII educational program, elevator mechanics' helpers would receive the same higher wages as elevator mechanics for work performed on Oklahoma public works projects.

Following the issuance of this Declaratory Ruling, NEII filed an action against the Oklahoma Department of Labor and Commissioner Calhoon in the United States District Court for the Western District of Oklahoma. In its Complaint, NEII asserted that the Commissioner's Declaratory Ruling was preempted by ERISA and the National Labor Relations Act, 29 U.S.C. § 151. NEII also asserted several pendent state claims.

Subsequently, the Oklahoma Department of Labor and Commissioner Calhoon moved to dismiss NEII's complaint. On May 31, 1990, the district court granted this motion. As to ERISA, the district court found that the Commissioner's Declaratory Ruling was saved from preemption by ERISA's federal savings clause, 29 U.S.C. § 1144(d). As to the

National Labor Relations Act, the court found that the declaratory ruling constituted a minimum labor standard independent of the collective bargaining process and thus not preempted. The district court also found that NEII's pendent state claims were barred by the Eleventh Amendment.

NEII appealed the district court's ruling to the Tenth Circuit Court of Appeals. In its February 26, 1992 opinion, the Tenth Circuit reversed the district court's decision. The Tenth Circuit found that the Commissioner's declaratory ruling related to an employee welfare benefit plan (i.e., NEII's training program for elevator mechanics' helpers), and was thus preempted by ERISA. The Tenth Circuit further found that the Commissioner's

Declaratory Ruling was not protected from preemption by ERISA's federal savings clause. In light of its finding of ERISA preemption, the Tenth Circuit did not consider NEII's National Labor Relations Act claim or the pendent state claims.

REASONS FOR GRANTING THE WRIT

Last Term, this Court observed that, when considering whether federal laws preempt state laws, the courts should "start with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476, 2482 (1991), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). By reading

ERISA's preemption provision too broadly, the Tenth Circuit's decision controverts that basic principle. This Court should grant this petition for the reasons set forth below.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH AND TENTH CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF ERISA'S SAVINGS CLAUSE TO STATE REGULATION OF EMPLOYEE TRAINING PROGRAMS.

In this case, the Tenth Circuit concluded that the Oklahoma Labor Commissioner's Declaratory Ruling was not protected from preemption by ERISA's federal savings clause, 29 U.S.C. § 1144(d). In spite of the fact that the Commissioner's ruling required United States Department of Labor approval of NEII's training program as a prerequisite to the payment of less than

journeymen wage rates to elevator mechanics' helpers, the Tenth Circuit found that preemption of the Commissioner's ruling would not impair, modify, or supersede any other federal law. In Electrical Joint Apprenticeship Committee v. MacDonald, 949 F.2d 270 (9th Cir. 1991), petition for certiorari filed, 60 U.S.L.W. 3655 (Feb. 3, 1992) (No. 91-1416), the Ninth Circuit reached the opposite conclusion. This Court should grant certiorari to resolve this fundamental conflict concerning the interpretation of ERISA's savings clause and the states' regulation of wage rates on public works projects.

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., is a comprehensive statute "designed to promote the interests of

employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). Although ERISA does not mandate particular benefits, it imposes participation, funding and vesting requirements and establishes standards for reporting, disclosure, and fiduciary responsibility. Under 29 U.S.C. § 1002(1), "apprenticeship or other training programs" constitute employee benefit plans subject to ERISA's provisions.

ERISA contains a general preemption provision, 29 U.S.C. § 1144(a), which states, in part, that its provisions "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . " However, ERISA also contains a

federal savings clause, 29 U.S.C. § 1144(d), which states, in part:

> Nothing in the subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . or any regulation or rule issued under any such law.

In this instance, federal law directly addresses one of the matters with which the Commissioner's Declaratory Ruling is concerned: the formulation of labor standards regarding the employment of apprentices. The Fitzgerald Act, 29 U.S.C. § 50 provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and laborers for the formulation of programs of apprenticeship, to cooperate with State

> agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education and Welfare in accordance with section 17 of title 20. . . .

United States Department of Labor regulations explain the purpose of the Fitzgerald Act and accompanying regulations as follows:

> The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices and to extend the application of such standards by prescribing policies and procedures concerning the registration for certain federal purposes of acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and de-registration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency

> as the appropriate agency for registering local apprenticeship programs for certain federal purposes; and matters relating thereto.

29 C.F.R. § 29.1(b). [emphasis added].

Subsequent regulations enacted pursuant to the Fitzgerald Act set forth the procedures for seeking registration of apprentice programs and the standards for such registration. 29 C.F.R. §§ 29.3-29.5. The standards for apprenticeship programs address the length of the apprenticeship, the schedule of wages to be paid, the nature of the review and evaluation of job performance, the ratio of apprentices to journeymen, and the adequacy and safety of equipment. 29 C.F.R. § 29.5. In addition, states are given the authority to establish committees to register apprenticeship programs. 29 C.F.R. §

29.12. The term "apprentice" is defined to include a broad range of workmen in skilled trades. 29 C.F.R. §§ 29.2(e), 29.4.

In this case, the Oklahoma Labor Commissioner's Declaratory Ruling furthers the policies and directives established by the Fitzgerald Act and accompanying regulations. The Declaratory Ruling encourages the extension of apprenticeship standards by establishing the federal standards as prerequisites to the payment of less than journeymen's wages on Oklahoma public works projects. To preempt the Commissioner's Declaratory Ruling, as did the Tenth Circuit, is to impair a federal law, a result prohibited by ERISA's savings clause.

In reaching a contrary conclusion, the Tenth Circuit relied primarily on Shaw v. Delta Air Lines, 463 U.S. 85 (1983), this Court's most recent pronouncement on the application of ERISA's savings clause to a federal statutory scheme that authorizes federal and state regulation in furtherance of federal policies. In Shaw, the Court concluded that whether ERISA preempted New York's laws prohibiting discrimination in providing pregnancy benefits depended upon the particular state law's relationship to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq. The Court found that New York laws that prohibited employment practices also prohibited by Title VII were protected from preemption by ERISA

savings clause. It reasoned that preemption of these state laws would frustrate the goal of joint state and federal enforcement of Title VII and that such disruption of the enforcement scheme contemplated by Title VII would modify and impair federal law. 463 U.S. at 103. However, the Court in Shaw further found that New York laws that prohibited employment practices that Title VII allowed were not protected from preemption by ERISA's savings clause. The Court reasoned that since "Title VII is neutral on the subject of all employment practices it does not prohibit," no federal law would be impaired by preemption of a state law extending beyond the reach of Title VII. 463 U.S. at 103-104. [emphasis added].

Contrary to the holding of the Tenth Circuit in the instant case, Shaw supports the application of ERISA's savings clause to the Labor Commissioner's Declaratory Ruling. Unlike the New York laws found to be preempted by the Shaw court, the Fitzgerald Act and accompanying United States Department of Labor regulations are not neutral regarding the standards for apprenticeship programs that the Oklahoma Labor Commissioner established as prerequisite to the payment of a lower trainee wage rate to elevator mechanics' helpers. The Fitzgerald Act and accompanying regulations encourage the formulation and promotion of labor standards for apprentices, and, by precluding the application of federal apprenticeship standards to an employee

training program, the Tenth Circuit's decision thwarts the policies of the Fitzgerald Act.[1]

In fact, in MacDonald, supra, the Ninth Circuit followed Shaw in finding that ERISA's savings clause protected a state's application of United States Department of Labor apprenticeship standards from preemption. MacDonald involved a Nevada law that allowed an exemption from the state's prevailing wage laws for apprenticeship programs approved by the Nevada Apprenticeship

[1] Throughout this proceeding, NEII has argued that, under Shaw, the fact that the United States Department of Labor has recognized the lower helper wage rate on federal public works projects requires states to do so as well. This argument is misguided, for, regardless of the federal rates, a state retains authority to establish wage rates on its own public works projects. Siuslaw Concrete Construction Co. v. Department of Transportation, 784 F.2d 952 (9th Cir. 1986).

Council but did not allow an exemption for federally approved programs. The Ninth Circuit concluded that Nevada could not allow the exemption for a state-approved apprenticeship program while denying the same exemption to a federally-approved program. It reasoned that, to the extent that state laws establish standards for apprenticeship programs apart from those set forth in the Fitzgerald Act and accompanying regulations, the state standards were preempted by ERISA. 949 F.2d at 274.

Significantly, under the Ninth Circuit's reasoning, regulation of apprenticeship programs through application of standards established by the Fitzgerald Act and accompanying regulations are expressly saved from preemption. The Ninth Circuit wrote,

"there is no exemption from the broad preemption provision of Section 514(a) of ERISA, except for the federal Fitzgerald Act and the regulations issued thereunder." [emphasis added]. 949 F.2d at 274. [emphasis added] The MacDonald Court further explained, "the approval of the JAC Apprenticeship Program by BAT in effect establishes that that program meets the requirements of the Fitzgerald Act, the only apprentice regulations that are permissible as not being preempted by Section 514(a) of ERISA." 949 F.2d at 274. The MacDonald court concluded that Nevada might properly exempt apprentices from Nevada's prevailing wage law if those apprentices were enrolled in a program approved by either the United

States Department of Labor or a state apprenticeship counsel.

Under the MacDonald court's holding, there is no impediment to denying a prevailing wage exemption (and thus requiring payment of wages at the higher journeymen rates) to apprentices in a program approved by neither a state apprenticeship counsel nor the United States Department of Labor. In fact, one federal district court has applied MacDonald to prohibit an employer from paying less than journeymen's wages to trainees on state prevailing wage projects who are enrolled in an unapproved training program. Dillingham Construction N.A. Inc. v. County of Sonoma, 778 F. Supp. 1522 (N.D. Cal. 1991).

The Ninth Circuit's application of ERISA's savings clause in MacDonald is thus in direct conflict with the Tenth Circuit's application of the same provision in the instant case. Under the Ninth Circuit's decision, a state may require federal approval of an apprenticeship program as a prerequisite to the payment of less than journeymen wage rates to trainees and apprentices on public works projects. Under the Tenth Circuit's decision, ERISA preempts a state's application of federal apprenticeship standards in determining apprentice wages.

Therefore, this case presents this Court with an opportunity to clarify its holding in Shaw regarding the scope of ERISA's savings clause. Since states are engaged in substantial regulation of

labor conditions on public works projects, guidance from this Court is needed as to the extent to which federal standards may be applied.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ERISA PREEMPTS STATES' REGULATION OF APPRENTICE WAGE RATES ON PUBLIC WORKS PROJECTS.

In its decision in this case, the Tenth Circuit extended ERISA's preemptive sweep into an area traditionally regulated by the states: wage rates on public works projects. The express terms of ERISA, regulations enacted pursuant to it, case law interpreting it, and the very purpose of its preemption provision do not support this extension of ERISA preemption. This Court should grant certiorari to consider the limits of ERISA preemption

when wage rates on public works projects are concerned.

Petitioners acknowledge that, in light of its broad preemption provision, 29 U.S.C. § 1144(a), ERISA has been held to preempt not only state laws involving matters addressed by ERISA (e.g., reporting, disclosure, and fiduciary responsibility standards), but also laws that "relate" to employee benefit plans. Shaw v. Delta Air Lines, 463 U.S. at 98. As a general rule, state laws have been held to "relate to" employee benefits plans if they have a "connection or reference to such plans," Shaw, 463 U.S. at 97. Under this standard, the following kinds of state laws have been held to "relate to" employee welfare benefit plans such as they are preempted by ERISA: (1) state laws that prescribe

the type and amount of contributions to a plan; (2) state laws that establish rules and regulations under which a plan must operate; and (3) state laws that establish the nature and amount of benefits provided under a plan. See General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2nd Cir. 1989) cert. denied 110 S.Ct. 2603 (1990).

Nevertheless, "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, 463 U.S. at 100 n. 21. Specifically, as to state laws concerning matters traditionally regulated by states, there is a presumption that Congress did not intend ERISA to be preemptive.

Massachusetts v. Morash, 490 U.S. 107, 118 (1989); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

The matter addressed by the Labor Commissioner in the instant case, wage levels on public works projects, has been traditionally regulated by the states. Morash, 490 U.S. 118; Siuslaw Concrete Construction Co. v. Department of Transportation, 784 F.2d 952, 958 (9th Cir. 1986). In addition, the Secretary of Labor has promulgated a regulation excepting from the definition of an "employee welfare benefit plan" regular wages paid to employees. 29 C.F.R. § 2510.3(b)(1). Moreover, a number of courts have held that claims to recover wages earned during the course of employment are not preempted

by ERISA. See e.g., Krause v. Dresser Industries, Inc., 910 F.2d 674, 680 (10th Cir. 1990); California Hospital Ass'n v. Henning, 770 F.2d 856, 859 (9th Cir. 1985), cert. denied, 477 U.S. 904, reh'g denied 478 U.S. 1031 (1986); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985).

To be sure, in its decision in the instant case, the Tenth Circuit relied on several cases holding certain aspects of state prevailing wage laws to be preempted by ERISA. However, the majority of these cases do not involve a state's attempt to directly regulate regular wage payments. See e.g., Local Union 598, Plumbers and Pipefitters Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir.) aff'd 488 U.S. 881 1988)

(Washington law mandating contributions to apprenticeship plan held preempted); Hydrostorage Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied 101 S.Ct. 72 (1990) (state law requiring participation in an apprenticeship program and requiring contributions to that plan held preempted); General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2nd Cir. 1989) cert. denied 496 U.S. 912 (1990) (state law requiring payment of prevailing benefits or their cash equivalent held preempted). In fact, in subsequent proceedings in General Electric, the Second Circuit held that the provisions of New York law that concerned wage payments could be severed from the non-wage benefit provisions

such that the wage provisions, unlike the benefit provisions, were not preempted by ERISA. 936 F.2d 1448, 1460-61 (2d Cir. 1991).

In addition, one of this Court's recent pronouncements in this area, Massachusetts v. Morash, supra, indicates that matters such as wage regulation on state public works projects fall outside the scope of ERISA preemption. In Morash, the Court held that an employer's policy of paying an employee for unused vacation time was not an "employee welfare benefit plan" such that an action to enforce that policy was not preempted by ERISA. In reaching this conclusion, this Court noted that, "in enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to

finance employee benefits and the failure to pay employees benefits from accumulated funds." 490 U.S. at 1115. The Court further noted that:

> Because ordinary vacation payments are typically fixed due at known times and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed--a danger Congress chose not to regulate in ERISA.

109 S.Ct. at 1673. [emphasis added].

This Court's preemption analysis in Morash does not support the Tenth Circuit's decision here. In particular, the regulation of wage rates for trainees on public works projects presents neither the risk of mismanagement of funds nor the risk of

a loss of non-wage benefits to employees. In requiring the payment of the higher journeymen wage rate until such time as NEII's training program is approved by the United States Department of Labor's Bureau of Apprenticeship Training, the Labor Commissioner did what he is authorized to do: regulate wages and encourage the extension of federally established standards to training programs. Therefore, this case presents this Court with an opportunity to clarify the limits of ERISA's preemption provision with regard to the states' authority over labor conditions on state public works projects. As one district court has written:

> The power to establish and enforce minimum employment standards falls squarely within the State's legitimate

> exercise of its police power. If the State were not able to require that apprenticeship programs be approved before employers may pay workers less than prevailing wages, then the apprenticeship system would become a wide-open loophole through which employers could hire and underpay workers on state public works contracts without offering them the legitimate benefits of apprenticeship status. It is inconceivable that either ERISA or the NLRA could be logically intended or construed to dictate this result.

Dillingham Construction N.A., Inc. v. County of Sonoma, 778 F. Supp. 1522, 1534 (N.D. Cal. 1991).

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN LOVING
ATTORNEY GENERAL OF OKLAHOMA

RABINDRANATH RAMANA*
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln, Suite 112
Oklahoma City, OK 73105
(405) 521-3921

MICHAEL M. SYKES
GENERAL COUNSEL
OKLAHOMA DEPARTMENT OF LABOR

KAYLA A. BOWER
ASSISTANT COUNSEL
OKLAHOMA DEPARTMENT OF LABOR

ATTORNEYS FOR DEAN H. CALHOON, AS FORMER COMMISSIONER OF LABOR FOR THE STATE OF OKLAHOMA AND THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA

*Counsel of Record